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Semangat Positif Sdn Bhd v Pelantar Agresif (M) Sdn Bhd & Ors (YTL Project Management Services Sdn Bhd, third party)

B

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S2–22–292 OF 2000
HARMINDAR SINGH JC
27 JULY 2009

C

Contract — Privity — Tenancy agreement — Agreement between plaintiff and first defendant — Whether plaintiff had right of action against second and third defendants who had same directors as first defendant

D

Landlord and Tenant — Determination — Breach by landlord — Compulsory acquisition of demised property by government — Whether defendant breached fundamental terms of tenancy agreement — Whether doctrine of frustration applicable — Contracts Act 1950 s 57

E

The first defendant who was the owner of the property held under PT No 34809 in Mukim Petaling ('the property') entered into a tenancy agreement dated 26 September 1998 with the plaintiff to rent out 23,445 sq m of the
F property ('the demised area') to the plaintiff. The plaintiff had wanted to construct a salt water pond, canteens and bunds on the demised area for their fishing activities. In 1997 the Government of Malaysia had initiated land acquisition proceedings on part of the property and on or about 22 September 1999 plans were underway to construct an Express Rail Link
G ('ERL') on the acquired land. It subsequently transpired that the facilities built by the plaintiff and the salt water pond had encroached onto the acquired land. When the plaintiff could not operate its fishing pond business it commenced the present action against the defendants for breach of the fundamental terms of the tenancy agreement which had caused the plaintiff
H to suffer losses and damage. Although the second and third defendants had the same directors as the first defendant, they were not privy to the tenancy agreement entered into between the first defendant, the owner of the demised area, and the plaintiff. In its defence the first defendant in reliance on the doctrine of frustration contended that the plaintiff's claim of breach of the
I terms of the tenancy agreement was misconceived in law. Nevertheless the first defendant included as the third party the project management consultant for the ERL Project claiming that if there was any liability on the part of the defendants, the same should be borne by the third party. In addition the first defendant also counterclaimed for unpaid rentals against the plaintiff. In the

course of the trial it was established that both the first defendant and the plaintiff were aware of the ERL Project and that they were under the impression that the demised area was outside the right of way of the ERL. The main issues for determination in this case were whether on the facts of this case there was any breach of the tenancy agreement as was alleged by the plaintiff and whether the doctrine of frustration applied.

Held, dismissing the plaintiff's claim with costs, the defendants' counterclaim with costs and the claim against the third party with costs:

(1) Although the second and third defendants shared the same directors as the first defendant, they were all separate entities and as such were not privy to the tenancy agreement between the first defendant and the plaintiff. As such the plaintiff had no case against the second and third defendants (see para 9).

(2) The whole purpose of the tenancy as was depicted in the tenancy agreement was for a fishing pond business. However, when the third party came into the picture the essence of the tenancy agreement was lost. Further, although both parties were aware that the area was to be acquired they did not think it fit to provide for this eventuality in the tenancy agreement. The only inference from this is that the plaintiff and first defendant must have been confident that the demised area was not within the ERL Project. It would therefore follow that when part of the demised area was acquired by the third party that the doctrine of frustration would apply and the tenancy agreement would become void (see paras 26–27 & 32).

(3) Since the tenancy agreement was void it follows that the first defendant was not entitled to any arrears in rental and thus the counterclaim must fail. The first defendant's claim against the third party also failed as a consequence (see para 34).

[Bahasa Malaysia summary

Defendan pertama ialah pemilik hartanah yang dipegang di bawah PT No 34809 di Mukim Petaling ('hartanah') yang menandatangani perjanjian penyewaan bertarikh 26 September 1998 dengan plaintif untuk menyewakan 23,445m persegi hartanah ('kawasan demis') kepada plaintif. Plaintif hendak membina kolam air masin, kantin dan permatang di kawasan demis untuk aktiviti-aktiviti memancing mereka. Pada tahun 1997 Kerajaaan Malaysia telah memulakan prosiding-prosiding pemerolehan tanah di bahagian hartanah tersebut dan atau pada 22 September 1999 rancangan-rancangan dijalankan untuk membina Lingkaran Rel Ekspres ('ERL') di atas tanah yang diperoleh tersebut. Apa yang berlaku kemudiannya ialah

kemudahan-kemudahan yang dibina oleh plaintif dan kolam air masin mencerobohi tanah yang diperoleh tersebut. Apabila plaintif tidak boleh menjalankan perniagaan kolam ikannya maka dia memulakan tindakan terhadap defendan-defendan kerana melanggar terma-terma asas perjanjian penyewaan yang menyebabkan plaintif mengalami kerugian dan kerosakan. Walaupun defendan kedua dan ketiga mempunyai pengarah-pengarah yang sama seperti defendan pertama, mereka tidak privi kepada perjanjian penyewaan yang ditandatangani di antara defendan pertama, pemilik kawasan demis dan plaintif. Dalam pembelaannya defendan pertama yang bergantung kepada doktrin kekecewaan menghujah bahawa tuntutan plaintif untuk pelanggaran terma-terma perjanjian penyewaan merupakan salah tanggap dalam undang-undang. Walau bagaimanapun defendan pertama turut melibatkan konsultan pengurusan projek untuk projek ERL sebagai pihak ketiga dan mendakwa bahawa sekiranya terdapat apa-apa liabiliti bagi pihak defendan-defendan, maka pihak ketiga perlu mempunyai liabiliti yang sama. Tambahan pula, defendan pertama juga menuntut balas untuk sewa yang belum dibayar terhadap plaintif. Dalam perjalanan perbicaraan dibuktikan bahawa defendan pertama dan plaintif sedar mengenai projek ERL dan mereka menganggap bahawa kawasan demis berada di luar hak lalu-lalang ERL. Isu utama untuk ditentukan dalam kes ini ialah sama ada berdasarkan fakta-fakta kes terdapat apa-apa pelanggaran perjanjian penyewaan sepertimana yang dihujahkan oleh plaintif dan sama ada doktrin kekecewaan boleh diguna pakai.

Diputuskan, menolak tuntutan plaintif dengan kos, tuntutan balas defendan-defendan dengan kos dan tuntutan terhadap pihak ketiga dengan kos:

(1) Walaupun defendan kedua dan ketiga berkongsi pengarah-pengarah yang sama seperti defendan pertama, mereka merupakan entiti yang berbeza dan oleh itu tidak privi kepada perjanjian penyewaan di antara defendan pertama dan plaintif. Oleh itu plaintif tidak mempunyai kes terhadap defendan kedua dan ketiga (lihat perenggan 9).

(2) Tujuan penyewaan seperti yang dinyatakan dalam perjanjian penyewaan ialah untuk perniagaan kolam ikan. Walau bagaimanapun, apabila pihak ketiga muncul maka asas perjanjian penyewaan hilang. Selanjutnya walaupun kedua-dua pihak sedar bahawa kawasan tersebut akan diperoleh, mereka berfikiran bahawa adalah tidak sesuai untuk memperuntukkan kemungkinan ini dalam perjanjian penyewaan. Satu-satunya inferens daripada ini ialah plaintif dan defendan pertama perlu yakin bahawa kawasan demis bukannya berada dalam projek ERL. Oleh itu apabila kawasan demis diperoleh oleh pihak ketiga maka

doktrin kekecewaan boleh digunapakai dan perjanjian penyewaan menjadi tidak sah (lihat perenggan 26–27 & 32).

(3) Memandangkan perjanjian penyewaan tidak sah maka defendan pertama tidak berhak kepada mana-mana tunggakan sewa dan oleh itu tuntutan balas harus gagal. Akibatnya, tuntutan defendan pertama terhadap pihak ketiga juga gagal (lihat perenggan 34).]

Notes

For cases on determination generally, see 9 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 853–1015.

For cases on privity generally, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 4609–4643.

Cases referred to

Codelfa Construction Ptd Ltd v State Rail Authority of New South Wales (1982) 41 ALR 607, HC (refd)

Eastern & Oriental Hotel (1951) Sdn Bhd v Ellarious George Fernandez & Anor [1989] 1 MLJ 35, SC (refd)

Guan Aik Moh (KL) Sdn Bhd & Anor v Selangor Properties Bhd [2007] 4 MLJ 201, CA (refd)

Ocean Tramp Tankers Corp v V/O Sovfracht [1964] 1 All ER 161, CA (refd)

Standard Chartered Bank v Kuala Lumpur Landmark Sdn Bhd [1991] 2 MLJ 251, HC (refd)

Yee Seng Plantations Sdn Bhd v Kerajaan Negeri Terengganu & Ors [2000] 3 MLJ 699, CA (refd)

Legislation referred to

Contracts Act 1950 ss 57, 66

Land Acquisition Act 1960

N Saraswathy Devi (Venkateswari Alagendra & Sharon Shakila Gabriel with her) (N Saraswathy Devi) for the plaintiff.

R Subithra (K Surendran and Norhazirah bt Md Desa with her) (Surend Mokzani & Partners) for the defendants.

Felix Dorairaj (Dorairaj, Low & Teh) for the third party.

Harmindar Singh JC:

[1] The plaintiff and the first defendant entered into a tenancy agreement dated 26 September 1998. The plaintiff claims that the defendants had breached fundamental terms of this tenancy agreement. The plaintiff is claiming for losses and damage suffered as a result of that breach. The defendants are claiming that the plaintiff's claim of breach of the covenants under the tenancy agreement is misconceived in law and rely on the doctrine

of frustration. They are also counterclaiming for unpaid rentals. Nevertheless, the first defendant has also brought in a third party claiming that if there is any liability on the part of the defendants, the same should be borne by the third party.

[2] From the evidence adduced at the trial, the following facts emerged. In the tenancy agreement itself, the demised area was 23,445 sq meters and was marked in red in the plan attached ('demised area'). The demised area was part of the property held under HS(D) 101012, PT No 34809 Mukim Petaling, Daerah Petaling, Negeri Selangor Darul Ehsan ('the whole property'). The first defendant was the owner of the whole property. The boundaries of the demised area were designated in the plan attached. There was already an existing fresh water pond on the whole of the property. Whether it was also in the demised area was disputed by the defendants but asserted by the plaintiff. The plaintiff had wanted to construct a salt water pond, canteens and bunds on the demised area for their fishing activities. There was also an access road which the plaintiff wanted to use but it was outside the demised area.

[3] Now, everything went well and would have gone well if not for a significant intervening event by the third party. The third party was the project management consultant for the construction of the Express Rail Link ('ERL'). In 1997, the Government of Malaysia initiated land acquisition proceedings on part of the first defendant's land. The contractor for this project was given access to the acquired land immediately after the land authority had served the 'Borang K' under the Land Acquisition Act 1960 on the first defendant on or about 22 September 1999.

[4] It subsequently transpired that the facilities built by the plaintiff and the salt water pond had encroached onto the acquired land. Efforts were made by all the parties to come to an amicable arrangement but these efforts were eventually in vain. The net result was that the part of the salt water pond had to be filled up, the salt water canteen was demolished, the access road was cut off and the dumping of sand and stone at the side of the bund caused the movement of sludge and grass into the fresh water pond. The plaintiff claimed that they could not operate its fishing pond business. Given this state of affairs, I had no doubt that this was indeed the case.

[5] The plaintiff therefore submitted that the defendants were in breach of the fundamental terms of the tenancy agreement and in particular cl 8 (ii), (iii) and (vi). The breach asserted can be summarised as follows:

(a) failed to allow the plaintiff to peaceably hold and enjoy the said property during the tenancy without interruption or disturbance from the defendants or any person lawfully claiming through or in trust for the defendant;

(b) failed to allow the plaintiff and its agents, servants, invitees, licensees and/or customers free and uninterrupted ingress and egress from and to the said property by cutting off the only available access to the said land; and

(c) polluted the waters with their construction works either by themselves, their agents and/or their servants.

[6] In their defence, the first defendant alleged that the plaintiff had constructed facilities outside the demised area. They submitted that by their own accord and conduct, in building such structures, the plaintiff had breached the tenancy agreement. The first defendant also submitted additionally and alternatively that because of the actions of the third party, the tenancy agreement was deemed to be frustrated.

[7] The pivotal question that arises is whether there was any breach of the tenancy agreement as alleged by the parties, and in any event, if the doctrine of frustration applied in this case.

[8] From the rather messy state of affairs, two important issues emerge which require consideration at the outset. They are firstly, whether the parties where aware of the ERL project passing through the demised area and secondly, how was the demised area measured and identified.

[9] Before I deal with these two issues, there is one matter that for convenience has to be dealt with first. This had to do with the fact that the plaintiff has sued three different defendants for breach of a tenancy agreement. It was only the first defendant who was the owner and landlord of the demised area. Although the second and third defendants had the same directors as the first defendant, they were not privy to the tenancy agreement. The fact that letters were issued and sent out on the letter heads of the second and third defendants does not make them responsible. They were after all separate entities. There was therefore no case against the second and third defendants. Only the first defendant had a case to answer being a party to the tenancy agreement.

[10] I now come back to the two issues.

WERE THE PARTIES AWARE OF THE ERL PROJECT ON THE DEMISED AREA?

[11] It was not disputed that the first defendant was aware of the ERL project. The land acquisition proceedings had commenced in 1997 and gazetted on 5 June 1997 as evidenced in Form K. The first defendant admitted knowing about the ERL project but claimed that they did not know the precise boundaries of the right of way ('ROW') of the ERL. The question is did they inform the plaintiff about this at the time of signing the tenancy agreement?

[12] The first defendant claims that they did for two reasons. The first is that on the plan attached to the tenancy agreement, there was the presence of the ERL track. The second is that the letter of 15 November 1999 by the plaintiff shows that the plaintiff was aware of the ERL project.

[13] As for the first reason, it is noteworthy that nowhere in the tenancy agreement itself is the ERL project mentioned. The ERL track is also not stated as such in the plan and therefore means nothing to anyone other than the first defendant. This does not prove knowledge on the part of the plaintiff.

[14] As for the second reason, it is necessary to allude to the contents of the letter to determine if the plaintiff had knowledge of the ERL project at the outset. This letter of 15 November 1999 was written by the plaintiff to the first defendant. The body of the letter is reproduced in its original form as follows:

> RE: FISHING POND BUSINESS BEING AFFECTED BY ERL
>
> On 10th of November we were informed by contractor from YTL Mr Eddie handphone 019-2278395 that they are going to start the ERL project very soon. We were neither received any notice from your company (landowner) nor ERL consortium before this. To our surprises, according to their survey, their acquisition is until the end of the canteen. This will definitely affect our business.
>
> After meeting with Mr Sam Ah Chong, your project GM with our Mr Michael Lim & YTL's Mr Eddie. The original plan & YTL's new plan is totally different. Initially before we construct the pond, we were aware about the ERL project & we were very careful about the border line, but now it seems that if the project were to follow the new plan, then we would not be able to operate the fishing business anymore. As base on our tenancy agreement that sign between Semangat Positif (M) Sdn Bhd & your company is valid until end of September 2000. We hope that

you can help us to solve the problem by clarified the border line with the YTL people & kindly instruct the YTL construction people to stop work beyond the border line.

Thank you very much.

[15] In his evidence, SP1 of the plaintiff claimed that there is a typographical error in the letter in that the line 'we were aware about the ERL project' should read as 'we were not aware about the ERL project'. The plaintiff submits that this together with the line that says that the plaintiff never received any notice shows lack of knowledge of the ERL project on the part of the plaintiff.

[16] After careful consideration however, this explanation cannot be right. If it was the case that there was a typing mistake, then it makes no sense in the context of the whole sentence. It was because they were aware of the ERL project that they claimed that they were careful about the boundaries.

[17] If indeed it was the case that at the point of signing the tenancy agreement the plaintiff was unaware of the ERL project, then I'm sure the letter of 15 November 1999 would be worded differently. There could at least be an emphatic statement that there was no such disclosure at the outset rather than talking about not receiving a notice.

[18] I should also add that in a situation like this, it would be more reliable to refer to the contemporaneous documentary evidence rather than the evidence of witnesses trying to recollect the events after some time has passed (*Eastern & Oriental Hotel (1951) Sdn Bhd v Ellarious George Fernandez & Anor* [1989] 1 MLJ 35). For these reasons, I am convinced that the plaintiff was aware of the ERL project at the time of signing the tenancy agreement.

HOW WAS THE DEMISED AREA MEASURED AND IDENTIFIED?

[19] It was not disputed that when the tenancy agreement was signed, the demised area that appeared in the plan attached was not measured or identified except that it was to be 23,445 sq metres. What transpired then was that the parties went to the site and identified and marked out the area which was then fenced. Obviously the plaintiff wanted to include the existing pond. Since both parties were aware of the ERL project, they both must have been under the impression that the area marked out as the demised area was outside the boundary or the ROW of the ERL.

[20] The plaintiff is trying to assert that at that time, the first defendant would have known the precise boundaries of the ERL Pproject. If that was true, then the first defendant would certainly be guilty of misrepresentation at least. But I do not think that was the case. From the way the parties dealt with each other, it appeared to me that the first defendant had wanted the plaintiff to succeed in its fishing pond business so that the tenancy could be a long term one and financially rewarding as well. I was therefore quite satisfied that the first defendant did not know of the precise boundaries of the ERL project but they must have been certain in their minds that it did not fall within the demised area.

[21] As the evidence later disclosed, part of the demised area encroached onto the acquired land. There was not much dispute on this as the parties were resigned to accept the plan that was produced by the third party to show the exact boundaries of the acquired land. This would be sometime in November 1999. Hence that letter of 15 November 1999 by the plaintiff.

DOES THE DOCTRINE OF FRUSTRATION APPLY?

[22] Given this set of circumstances, would this be a case where the doctrine of frustration applies as the first defendant suggests?

[23] This doctrine of frustration is embodied in s 57 of the Contracts Act 1950 which provides:

> Agreement to do impossible act
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> 57
>
> (1) An agreement to do an act impossible in itself is void.
>
> Contract to do act afterwards becoming impossible or unlawful.
>
> (2) A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.
>
> Compensation for loss through non-performance of act known to be impossible or unlawful.
>
> (3) Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, the promisor must make compensation to the promisee for any loss which the promisee sustains through the non-performance of the promise.

[24] The application of s 57 was discussed by the Court of Appeal in *Guan Aik Moh (KL) Sdn Bhd & Anor v Selangor Properties Bhd* [2007] 4 MLJ 201 where it was held as follows (at p 207):

> It follows from the foregoing authorities that there are three elements woven into the fabric of the doctrine embodied in s 57. First, the event upon which the promisor relies as having frustrated the contract must have been one for which no provision has been made in the contract. If provision has been made then the parties must be taken to have allocated the risk between them. Second, the event relied upon by the promisor must be one for which he or she is not responsible. Put shortly, self induced frustration is ineffective. Third, the event which is said to discharge the promise must be such that renders it radically different from that which was undertaken by the contract. The court must find it practically unjust to enforce the original promise. If any of these elements are not present on the facts of a given case, then s 57 does not bite.

[25] In arriving at this conclusion, the Court of Appeal in *Guan Aik Moh*, followed the Court of Appeal in *Yee Seng Plantations Sdn Bhd v Kerajaan Negeri Terengganu & Ors* [2000] 3 MLJ 699 in applying the dictum of Lord Denning MR in *Ocean Tramp Tankers Corp v V/O Sovfracht* [1964] 1 All ER 161 (CA) as follows:

> It has frequently been said that the doctrine of frustration only applies when the new situation is 'unforeseen' or 'unexpected' or 'uncontemplated', as if that were an essential feature. But it is not so. It is not so much that it is 'unexpected', but rather that the parties have made no provision for it in their contract. The point about it, however, is that: If the parties did not foresee anything of the kind happening, you can readily infer that they have made no provision for it. Whereas, if they did foresee it, you would expect them to make provision for it. But cases have occurred where the parties have foreseen the danger ahead, and yet made no provision for it in the contract. Such was the case in the Spanish Civil War when a ship was let on charter to the Republican Government. The purpose was to evacuate refugees. The parties foresaw that she might be seized by the Nationalists. But they made no provision for it in their contract. Yet, when she was seized, the contract was frustrated: see *WJ Tatem Ltd v Gamboa* [1938] 3 All ER 135. So, here, the parties foresaw that the canal might become impassable. It was the very thing that they feared. But they made no provision for it. So the doctrine may still apply, if it be a proper case for it.

[26] In the instant case, no provision was made in the contract for the possible acquisition of part of the demised area by the third party. It was also not in dispute that the tenancy was for a fishing pond business. When part of the demised area was taken away by the third party, it became quite impossible for the plaintiff to continue its business. The whole purpose of the tenancy as was depicted in the tenancy agreement itself, was for the fishing rights. When the third party came in, the essence of the agreement was lost.

[27] The only issue in this case would be whether the frustrating event took place without blame or fault on the side of the party seeking to rely on it or in other words, self-induced frustration. The plaintiff takes the position that the first defendant should have known or taken steps to find out the precise area to be acquired. However, as I indicated earlier, both parties were aware of it and did not think it fit to provide for this eventuality in the tenancy agreement. The only inference is that the parties must have been confident that the demised area was not within the ERL project.

[28] Obviously, an error was made by the parties in that part of the demised area fell within the acquired area for the ERL project. Both parties appeared to have a plan as was referred to in the letter of 15 November 1999. This turned out to be quite different from the plan later shown by the third party. This is again alluded to in the same letter. Can the doctrine of frustration apply where there was a mistake on the part of both parties?

[29] In the Australian case of *Codelfa Construction Ptd Ltd v State Rail Authority of New South Wales* (1982) 41 ALR 607 which was applied in *Standard Chartered Bank v Kuala Lumpur Landmark Sdn Bhd* [1991] 2 MLJ 251, the facts were as follows. A contract was entered into between Codelfa and the relevant authority to complete construction work within 130 weeks in Sydney. The understanding with the relevant authority was that they could carry out work on a three shift continuous basis six days a week without restriction as to Sundays.

[30] However, proceedings were taken to restrain nuisances and an injunction was granted to restrain Codelfa from working between 10pm to 6am each day. Codelfa also undertook not to work on Sundays. Consequently, there was a delay in the performance of the contract. A claim was made by Codelfa following frustration of the contract. Arbitration proceedings were commenced out of which a case was stated for the opinion of the court. Both the Court of Appeal and the Supreme Court of New South Wales took the view that there was no frustration of the contract. Upon appeal to the High Court of Australia, it was held by four of the five judges that the grant of the injunction might well have frustrated the contract and the arbitrator had jurisdiction to make a finding on this issue.

[31] Of particular relevance to the instant case was the observations made by Mason J who stated as follows (at p 380):

> The second objection is that the proposition does not sufficiently acknowledge the fact that the event which generally, if not universally, works a frustration, is an event which supervenes after the making of the contract, viz a change in the law which makes it impossible for the parties to execute the contract. It is not surprising that the cases commonly throw up situations of supervening

impossibility caused by a change in the law — they are the more common instances of the unforeseen or unexpected occurrence. *But in principle there is no reason why a mutual assumption arising from a mistaken view that an activity is immune from injunctive relief should not attract the principle of frustration*. No doubt it is more difficult in such a case to show that the grant of injunctive relief was not foreseen or could not reasonably have been foreseen, but if that can be shown then the doctrine of frustration should apply. The injunction is a supervening event though it does not stem from any alteration in the law. (Emphasis added.)

[32] In the same vein, I should think that in the instant case when there was a mistake as to the demised area, the doctrine of frustration would apply. It would therefore follow that when part of the demised area was acquired by the third party, the tenancy agreement in the present case became void.

[33] The only question left for consideration was whether any advantage gained under the agreement was bound to be restored under s 66 of the Contracts Act 1950. In the present case, although the plaintiff had to pay rentals up to the point when they terminated the tenancy agreement, it was also in evidence that they had earned substantial income during the subsistence of this tenancy notwithstanding the costs incurred in building the structures and the pond. No submissions were made by either party for restoration of any advantage under s 66 of the Contracts Act. I would therefore leave the benefits obtained by both parties as they are.

[34] As for the counterclaim, since I have taken the view that the tenancy agreement is void, the first defendant is not entitled to any arrears in rental. As for the claim by the first defendant against the third party, this claim also fails as a consequence. This was really a claim for full indemnity by the defendants for the plaintiff's claim. In any event, I see no merit in the claim against the third party as the third party was acting well within its right to conduct work on the compulsorily acquired land. There was no privity of contract between the first defendant and the third party and if there was any claim of a tortious nature, it was the plaintiff and not the first defendant who suffered damage if any.

[35] To sum up, the plaintiff's claim is dismissed with costs. The counterclaim is dismissed with costs. The claim against the third party is also dismissed with costs.

The plaintiff's claim dismissed with costs. The defendants' counterclaim dismissed with costs. The claim against the third party dismissed with costs.

Reported by Kohila Nesan